FILE COPY

OCT 29

CHARLES ELM

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1934

No. 134

HARRY SCHNELL and SAMUEL SCHNELL, copartners, doing business as H. SCHNELL & COMPANY
Petitioners

against

THE STEAMSHIP VALLESCURA, her engines, boilers, etc.

LLOYD MEDITERRANEO
Respondents

BRIEF FOR PETITIONERS

JOSEPH JOFFE
LOUIS JOFFE
Counsel for Petitioners

THE CHARLES WATSON RUSSELL PRESS, INC.

INDEX

PAGE

Official Reports of the Opinions Below 1

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked 2

Statement of the Case 2

Decision of the Circuit Court of Appeals 5

Specifications of Error Intended to Be Urged 6

POINT I.—The petitioners have sustained their burden of proof as to damages 7

A. An exception in a bill of lading does not exempt the ship from liability for loss or damage from an excepted peril to which its negligence contributed 8

B. Where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it seems impossible to distinguish between the consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the uncertainty and the entire loss, or make the separation himself 19

CONCLUSION.—The decree of the Circuit Court of Appeals should be reversed 22

TABLE OF CASES CITED.

PAGE

American Finance & Commerce Co., Inc. *v.* United States, 55 F. (2d) 725 22

Brauer, *et al.* v. Campania Navigacion La Flecha, 66 Fed. 776; 168 U. S. 104 ..... 14, 17

Calderon *v.* Atlas S. S. Co., 170 U. S. 272 17
Cau *v.* Texas & Pac. Ry. Co., 194 U. S. 427 10
Chicago, etc., Ry. Co. *v.* McCaull-Dinsmore Co., 253 U. S. 97 23
Clark *v.* Barnwell, 12 How. 272 ..... 10, 18
Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104 9
Corsar *v.* J. D. Spreckels, etc., Co., 141 Fed. 260 11

Dowagiac Mfg. Co. *v.* Minnesota Plow Co., 235 U. S. 641 21

Galveston H. & S. A. Ry. Co. *v.* Wallace, 223 U. S. 481 .. 12
Gilchrist Transp. Co. *v.* Boston Ins. Co., 223 Fed. 716 .. 9, 14

Hamilton Shoe Co. *v.* Wolf Bros., 240 U. S. 251 .... 19, 20, 21
Hetzel *v.* Baltimore & Ohio R. Co., 169 U. S. at 38 ..... 7, 15

Jenkins *v.* Penn. R. Co., 67 N. J. L. 331 19

Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397 ..... 8, 9, 10, 16, 17

Maghee *v.* The Camden, etc., R. R. Co., 45 N. Y. 514 ... 11
May, *et al. v.* Hamburg, etc., 290 U. S. at 352 18

Nicholas, *et al. v.* N. Y., etc., R. Co., 89 N. Y. 370 17

Snow, *et al. v.* Carruth, *et al.*, 22 Fed. Cas. No. 13144; 1 Sprague 324 21
Story Parchment Co. *v.* Paterson Co., 282 U. S. 555 .... 19, 23

Texas & Pac. R. Co. *v.* Reiss, 183 U. S. at 626 17
The "Atlas", 93 U. S. 302 ..... 7, 19, 20
The Bencleuch, 10 F. (2d) 49 11
The Delaware, 161 U. S. 459 17
The Edwin I. Morrison, 153 U. S. 199 ..... 9, 12, 17

PAGE
The Ellerdale, 10 F. (2d) 53 12
The Eugene F. Moran, 212 U. S. 466 21
The Folmina, 212 U. S. 354 ..... 8, 17
The Isla De Panay, 292 Fed. 723 .....10, 11
The Mary Belle Roberts, 22 Fed. Cas. No. 13240 ....13, 16, 19
The Max Morris, 137 U. S. 1 .....7, 21, 22
The Mohler, 88 U. S. 230 .....12, 13
The Olga S., 25 F. (2d) 229 ..... 9, 14
The Portsmouth, 9 Wall. 682 11
The Rona, 51 L. T. at 32, 5 Asp. 259 .....14-15, 16
Transportation Co. *v.* Downer, 11 Wall. 129 10

Vicksburg *v.* Henson, 231 U. S. 259 16

Westinghouse Co. *v.* Wagner Mfg. Co., 225 U. S. 604 ...19, 20
Woodburn *v.* Cincinnati, etc., R[illegible] Co., 40 Fed. 731 17

STATUTES CITED.

Section 240 of the Judicial Code (amended by Act of Feb. 13, 1925, U. S. C. Title 28, Section 347) 2
Article 3, Section 2, Clause 1 of the Constitution of the United States of America 2
Harter Act (Act of Feb. 13, 1893; U. S. C., Title 46, Chapter 8, Secs. 190, 191) 17

MISCELLANEOUS.

Carver on Carriage at Sea, 7th Ed., Sec. 78, p. 114 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,—1934.

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H. SCHNELL & COMPANY,

Petitioners,

against

Steamship "VALLESCURA", her engines, boilers, etc.,
LLOYD MEDITERRANEO,

Respondents.

BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Official Reports of the Opinions Below:

The opinion of the Circuit Court of Appeals (R. pp. 327-330) is reported in 70 F. (2d) 261. The report of the Special Commissioner (R. pp. 312-317) and the opinion of the Dis-

trict Court confirming his report (R. pp. 319-320) are unreported. The opinion of the District Court upon the trial (R. pp. 247-248) is reported in 43 F. (2d) 247.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked:

(1) The decree to be reviewed is that of the Circuit Court of Appeals dated April 9, 1934.

The petition for certiorari was filed June 28, 1934 and the writ was granted October 8, 1934.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

The libellants are importers who sought to recover for damage to onions shipped from Spain to New York aboard the *S. S. Vallescura* to petitioners as consignees and purchasers of the bill of lading by bank letter of credit (R. pp. 3-6).

The carrier pleaded as a complete defense an exception against "decay" in the bill of lading (R. p. 11); also "perils of the seas" (R. p. 10); and alleged "and was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents * * *" (R. p. 11).

The evidence of shipment of the onions in good order and condition was given by the shipper in a deposition (R.

pp. 171-181), and by an onion broker (R. pp. 62-64). The bill of lading acknowledged shipment "in apparent good order and condition" (R. p. 228-A).

The evidence of delivery in damaged condition was given by the records of the Department of Health of the City of New York (R. p. 20); an Inspector of Customs of the Federal Government (R. p. 24) and the Department records (R. p. 228-B); an onion broker (R. pp. 66, 70); and one of the libellants (R. p. 37).

The Inspector of Customs testified that the damage due to "decay" was 40 to 50% of the onion cargo (R. p. 24) which was substantiated by the testimony of the onion broker (R. p. 66).

The evidence of the cause of the damage was established by respondent's own testimony, the deposition of Captain DULBECCO of the *S. S. Vallescura,* taken in 1928, to the effect that he kept the ventilators and hatches closed at all times at night (R. p. 227). Respondents' own expert at the trial testified that such conduct on the part of the master was improper care of the onion cargo (R. pp. 124-125).

The District Court (THACHER, J.) found the facts as testified by petitioners, and found that the damage was due to lack of ventilation, to which two causes contributed. One cause was due to negligence of the ship (R. p. 248):

> "Thus it appears that this notoriously perishable cargo of Spanish onions (*The Buckleigh,* 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous, and must have caused *substantial damage.*" (Italics ours.)

The other cause was (R. p. 248):

> "*It may be* that considerable damage resulted to this cargo from lack of ventilation during periods of

> the voyage when weather conditions required the closing of hatches and ventilators. If this be true difficulties of proof may arise." (Italics ours.)

The District Court entered an interlocutory decree in favor of the petitioners, referring the matter to a Commissioner to ascertain the damage due to the negligence of the ship (R. p. 249).

The report of the Commissioner (Mr. *Parkin*, Clerk of the Circuit Court of Appeals) is found at pages 312-317 of the Record. He found that out of a total of 552 hours when the ventilators and hatches were closed, they were *improperly* closed during 238 hours and *properly* closed during 144 hours because of bad weather, and stated, "It would seem, therefore, that the greater part of the damage must have been due to the improper shutting of the hatches and ventilators" (R. p. 314). He found that "from the nature of the case it is *impossible* to say how much of the decay was due" to each factor (R. p. 313). He decided (R. p. 315):

> "Where both shipper and carrier are at fault, it is plainly more just to divide the damages, but when only the carrier is at fault, and part of the damage is due to sea perils, it is more in accord with the principles applied in Equity to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whole loss."

The Commissioner found the sound value of the cargo was $23,249.91; that after reconditioning there was received $17,067.14; that the cost of reconditioning was $5,081.94; so that the damage was $11,264.71; interest was added (R. pp. 316-317).

The District Court (CAFFEY, J.) confirmed the Commissioner's report in all respects (Opinion, R. p. 319), and a

final decree was entered for $15,166.71, which included interest and costs (R. p. 320).

The Circuit Court of Appeals accepted the facts as found by the lower Court (R. p. 328).

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held:

(1) The facts as found by the lower Court were correct (R. p. 328).

(2) The petitioners failed as a matter of law to sustain their burden of proof of damages (R. pp. 329-330).

(3) It reversed the lower Court (MANTON, L. HAND and CHASE, C. JJ.) on the sole ground that the usual rule of damages is changed by the exception in the bill of lading against "decay". The Court said (R. p. 329):

> "* * * it would be more equitable, as the special master said, 'to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whole loss.' Generally speaking, we have no quarrel with this as an equitable principle. There appear to be paramount considerations in a case of this nature, however, which require a reversal of the result which was reached without giving effect to them."

and the paramount consideration (R. p. 329):

> "It was then encumbent upon the libellants to prove that the *prima facie* defense, inherent in decay damage under the exceptions in the bills of lading, was not conclusive by showing that the decay was

caused in whole or in part by the ship's negligence. Proof that it had been wholly caused by the ship's negligence would have destroyed the *prima facie* defense. Proof that the decay was caused in part by such negligence overcame that defense *pro tanto*. But as the burden was on the libellants to prove not only that the onions had been damaged but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship."

Specifications of Error Intended to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that the petitioners failed to sustain their burden of proof of damages and dismissing the libel:

(a) By holding that where damage caused is within an exception in the bill of lading, to which the negligence of the ship has contributed, the ship is nevertheless exempt from liability for loss or damage from said peril, and the cargo owner must prove what damage was not caused by said peril;

(b) By holding that where, from the nature of the case, it seems impossible to distinguish between the consequences due to the negligence of the wrongdoer, and consequences not due to its negligence, the usual equitable rule—the one who has caused the confusion, as against an innocent party, must bear the entire loss—is inapplicable to the case at bar because of the exception in the bill of lading.

POINT I.

The petitioners have sustained their burden of proof as to damages.

The decision of the Circuit Court of Appeals presents no issue of fact, as stated in its opinion, and the Circuit Court of Appeals agrees that it would be more equitable "to compel one whose fault has caused the confusion to make the proper apportionment or bear the whole loss", but states that the exception against "decay" in the bill of lading makes an inequitable result necessary, and requires the disregard of that equitable principle.

This paramount consideration cannot be the difference between tort and contract, because on the question of damages—*the just indemnity for the wrong*—that difference is irrelevant.

Hetzel v. *Baltimore & Ohio R. Co.*, 169 U. S. at 38.

Nor can it be on the theory that Admiralty law does not follow the common law. That is not so, for where two wrongdoers contribute to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the wrongdoers.

The "Atlas", 93 U. S. 302 at 317.

In fact, Admiralty is the most equitable of all branches of the law. There (unlike at common law) even where the shipper's negligence contributed to cause the damage, he may recover half the loss, though he cannot apportion the amount caused by the ship.

The Max Morris, 137 U. S. 1.

An examination of the law applicable to exceptions in carrier bills of lading will show, not only that such exceptions do not give rise to paramount considerations requiring a departure from "the equitable rule", but on the contrary, require the enforcement of such equitable rule, so as not to produce an unjust and illegal result.

A.

An exception in a bill of lading does not exempt the ship from liability for loss or damage from an excepted peril to which its negligence contributed.

The holding of the Circuit Court of Appeals to the effect that the exception in the bill of lading continues to exempt the ship from liability, after proof that its negligence contributed to the loss, is contrary to the expressed statement of this Court.

GRAY, J., in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, said at 438:

> "But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea *or other specified perils* does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed." (Italics ours.)

The reason for the rule, as stated above by Judge GRAY, was rationalized by this Court in *The Folmina*, 212 U. S. 354 at 361-362. Primarily, the carrier is liable as an in-

surer against all loss except only two irresistible causes, as act of God and public enemies. Exceptions against other causes in bills of lading (or other contract) are permitted to the extent "no human skill or diligence can guard against". If goods are received in good order and delivered damaged, the burden lies upon the carrier to show it was occasioned by one of the perils for which it was not responsible. Where the damage is "decay", "the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden (of going forward with the evidence) is upon the shipper to establish that the goods are *removed from its operation because of the negligence of the carrier.*"

Proof that the negligence of the carrier *contributed* to cause the damage, removes the goods from the operation of the exception and the exception no longer exempts the carrier from liability for the damage.

> "By the laws of both countries, the ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed." (GRAY, J. in *Compania De Navigacion La Flecha* v. *Brauer*, 168 U. S. 104 at 118.)

See to the same effect:

> *Liverpool Steam Co.* v. *Phenix Ins. Co., supra;*
> *The Edwin I. Morrison*, 153 U. S. 199 at 211;
> *Gilchrist Transp. Co.* v. *Boston Ins. Co.*, 223 Fed. 716 at 720, 722 (C. C. A. 6);
> *The Olga S.*, 25 F. (2d) 229 at 230, 231 (C. C. A. 5).

It is submitted that the above rulings of this Court and of the other circuits are squarely contra to the rule laid down by the Circuit Court of Appeals in the case at bar, to the effect that the exception is only overcome *pro tanto* and continues nevertheless to exempt the ship.

The cases cited by the Circuit Court of Appeals to sustain its statement of the law are all cases where the damage was caused "without negligence or fault on the part of the master or owners", and there was no question considered or discussed involving an excepted peril to which the negligence of the carrier contributed. The cases cited (R. p. 330) are *Clark* v. *Barnwell*, 12 How. 272 (see p. 283); *Transportation Co.* v. *Downer*, 11 Wall. 129 (see pp. 133-134); *Cau* v. *Texas & Pac. Ry.*, 194 U. S. 427 (see p. 432); *The Isla De Panay*, 292 Fed. 723 (see pp. 727-728).

The respondent, in its brief in opposition to the petition for certiorari, attempted to draw a distinction between negligence contributing to excepted perils like "perils of the sea", and negligence contributing to excepted perils like "decay". No such distinction is attempted to be made by the Circuit Court of Appeals or any cited case. This Court, on the contrary, in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, *supra*, and the other cases cited by the petitioners, repeatedly states that the rule of the ship's negligence contributing to excepted perils applies to "perils of the sea *or other specified perils*". There is neither reason nor justice to distinguish, in any case, between perils to which the negligence of the ship contributes; and especially is there no reason in this case, because the real peril involved, the peril to which the negligence of the ship contributed—to cut off ventilation—was no other than a "peril of the sea" and was so stated by the Circuit Court of Appeals (R. p. 327).

And in consequence of its ruling, the Circuit Court of Appeals fell into further error by requiring the cargo owner

"to prove what damage was caused by the negligence of the ship" by "showing in addition, that the onions were damaged by decay which would not have occurred in spite of inadequate ventilation in good weather" (R. p. 330). This statement of the law is contra to the established rule so well stated by Judge ANDREWS in *Maghee* v. *The Camden, etc., R. Co.*, 45 N. Y. 514 at 523:

> "If it could be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier. (*Davis* v. *Garrett*, 6 Bing. 716; *Danseth* v. *Wade, supra;* Story on Bailments, *supra;* Abbott on Shipping, 362.)"

See also:

> *The Portsmouth*, 9 Wall. 682 at 684;
> *Corsar* v. *J. D. Spreckels, etc., Co.*, 141 Fed. 260 at 264 (C. C. A. 9).

The statement of law contrary to the above cases laid down by the Circuit Court of Appeals, to the effect that the petitioners left the cause of the damage in doubt by their failure to show that the damage would not have occurred in spite of the negligence of the ship, "though it might in part have been attributable to the negligence of the ship" (R. p. 330), is not supported by the cases cited in its opinion. In the *Isla De Panay*, 292 Fed. 723, the damage was caused "free from negligence" of the ship (p. 728), and there was no question considered or discussed involving an excepted peril to which the negligence of the carrier contributed. In *The Bencleuch*, 10 F. (2d) 49, the damage was caused *entirely* by the negligence of the ship in discharge of the cargo; the damage was *distinguishable*, possible of observation,

physical separation, and was actually *proved* in that case and its companion case on the following page, *The Ellerdale*, 10 F. (2d) 53.

If there is any doubt whether its negligence did or did not contribute, that doubt must be resolved against the carrier and in favor of the shipper.

> *The Edwin I. Morrison, supra,* page 212;
> *The Mohler,* 88 U. S. 230 at 233.

In the case at bar, there is no doubt, because the District Court found the negligence of the ship contributed to the excepted peril, and its finding and that of the Commissioner on the facts have not been disturbed.

The ship, claiming the benefit of conditional exception to its primary liability, has the burden of proof that the exception was fulfilled. Having failed to prove its defense, its liability is unimpaired.

> *Galveston H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481 at 492;
> *The Mohler, supra* (88 U. S. 230 at 233); Cases, *supra.*

In the *Galveston H. & S. A. Ry. Co.* v. *Wallace, supra,* this Court, by LAMAR, J., said at page 492:

> "The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them or explaining why that had not

> been done. This must be so, because carriers not only have better means, but often the only means, of making such proof."

The ship, in the case at bar, pleaded the exception against "decay" as a complete defense (R. p. 11) and alleged (R. p. 11) that it "was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents or representatives * * *." This complete defense the ship admittedly failed to sustain. As was said by DAVIS, J., in *The Mohler, supra,* at page 233:

> "The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

But assuming that the ship was permitted to prove a partial defense under its pleading, or in mitigation of damages, the ship has failed to sustain its burden of proof.

> *The Mary Belle Roberts,* 22 Fed. Cas. No. 13240 (S. D. Cal.).

In this leading case, the Court said at page 930:

> "That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils, encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.
>
> "The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause

for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately?"

and decided (same page):

"By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself *in toto*, he should establish the degree and extent of the exoneration to which he is entitled.

"If he fails to do this, it seems to me that he must be held responsible for the whole damage."

See also:

Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716, 720-722 (C. C. A. 6);
The Olga S., 25 F. (2d) 229 at 230-231 (C. C. A. 5);
Brauer, et al. v. *Campania Navigacion La Flecha*, 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104.

In England, the same rule is stated as to carriers and bill of lading exceptions:

"There being some negligence established, it lies upon the shipowner to distinguish, if he can, what

> portion of the damage which has arisen, did not arise from the negligence which has been established against him * * *." (*Sir J. Hannen in The Rona,* 51 L. T. at 32, 5 Asp. 259.)

See also:

> *Carver on Carriage at Sea,* 7th Ed., Sec. 78, p. 114.

The rule stated in the above cases explains the form of the decree made by Judge THACHER.

Judge THACHER, having found that the petitioners had sustained the burden of proof of liability, ordered that the petitioners may recover only the damages caused by respondent's negligence.

The Circuit Court of Appeals, in the last portion of its opinion, stated that Judge THACHER indicated the rule of damages announced by it when he provided in his decree "that the libellants recover only such damage as was caused by closing the hatches and ventilators of the vessel at night in good weather." The statement of the Circuit Court is, it is submitted, erroneous.

Judge THACHER could not legally decree to petitioners damages not caused by respondents' negligence. Any other decree would violate the basic principle of damages in civil law, which is the same in tort and contract—*the just indemnity for the wrong* (*Hetzel* v. *Baltimore & Ohio R. R. Co.*, 169 U. S. at 38). The basic and only rule of liability permitted in civil law is that the libellant may recover *and does only recover* the damage caused by respondents' negligence.

Any other decree would foreclose the claimant from distinguishing what portion of the damage which had arisen did not arise from the negligence which has been established against him, and such a decree would be bad.

In delegating that question of damages to the Commissioner, it was for the Commissioner to determine what the proof of damages would show and the law applicable thereto. The latter questions *were not raised or argued before Judge* THACHER *nor decided by him* (R. p. 56) (*Vicksburg* v. *Henson,* 231 U. S. 259).

The District Court, in confirming the Commissioner's report, construed its own interlocutory decree (if construction was necessary) and the law applicable to proof of damages, which was in accordance with the law, as stated by this Court in the *Liverpool Steam Company* case and other cases cited above, that "an exception in the bill of lading of perils of the sea, or other specified perils, does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed".

And on the proof of damages, "it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him * * *" (*The Rona, Mary Belle Roberts,* and see other cases, *supra*).

Let us examine the exception clause in the bill of lading to see if there is some novel provision which would permit the carrier to escape the consequences of its negligence, as determined by the Admiralty and common law.

The pertinent clause is No. 3 and provides, as far as it is applicable (R. p. 228-A):

> "and not accountable for loss or damage resulting from stowage, sweating * * * decay * * * however caused."

First, there is nothing therein to change the general rule.

Second, the clause *as it stands*, with the words "however caused", is illegal and void, because it is unlawful to insert clauses which excuse the carrier from "loss or damage" arising from "negligence" in "care" of the cargo, or whereby such obligation to "care" for the cargo "is in anywise lessened, weakened or avoided" (*Harter Act*, U. S. Code of Laws, Title 46, Ch. 8, Secs. 190, 191).

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
> *The Delaware*, 161 U. S. 459 at 471;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272.

And the Court will not read into the clause anything to change its plain, unequivocal language to make it legal, but will declare the entire clause void (*Calderon* case, *supra*, p. 279; *Woodburn* v. *Cincinnati, etc., Ry. Co.*, 40 Fed. 731 at 735, 738 [C. C. E. D. Tenn.]; but see *Nicholas, et al.* v. *N. Y., etc., R. Co.*, 89 N. Y. 370 at 372).

Third, if the Court finds the language ambiguous, and will construe the clause or the words "however caused", it will do so "most strongly" in favor of the shipper and "most strongly against" the carrier which prepared the bill of lading (*Texas & Pac. R. Co.* v. *Reiss*, 183 U. S. at 626).

Thus, the Court may construe those words as did this Court in *Liverpool Steam Co.* v. *Phenix Ins. Co., supra* (129 U. S. at 441), or in *The Folmina, supra* (212 U. S. at 361)—paraphrasing:

> "however caused" means against which "no human skill or diligence can guard against".

Or, as in *The Edwin I. Morrison, supra* (153 U. S. at 211), or in *Brauer, et al.* v. *Campania Navigacion, supra* (168 U. S. at 118)—paraphrasing:

> "however caused" means except where "the ship's negligence or that of their servants contributed".

Or, as in the case of *Clark* v. *Barnwell*, 12 How. at 280—paraphrasing, as did the Circuit Court of Appeals in the case at bar:

> "however caused" means unless it "might have been avoided by the exercise of reasonable skill and attention on the part of the" carrier.

This last interpretation is not the most favorable to the shipper, not the interpretation given in the ship's own answer (R. p. 11), but notwithstanding, it will not prevent recovery in this case because a "substantial" part of the damage admittedly could have been avoided by due care on the part of the carrier. It is still a defense of a conditional exception to its liability, and the burden of proof is on the ship to fulfill the condition and defense in whole. The reasoning of the cases is stated by CARDOZO, J., in *May, et al.* v. *Hamburg, etc.*, 290 U. S. at 352:

> "the argument for the respondent loses sight of the value of a uniform rule that will put an end to controversy where the causal relation is uncertain or disputed. Particularly is there need of such a test where the carrier asks to be relieved from liability for conduct which without the benefit of the statute (or contract)* would be an actionable wrong."

This burden it has not sustained (cases, *supra*). Nor has it sustained its burden of proof in mitigation of damages.

Therefore, the relation of ship and cargo and the nature of exceptions in bills of lading, emphasize and require the application of the "equitable principle", and not its abrogation.

---

* Words in parentheses ours.

B.

Where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it seems impossible to distinguish between the consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the uncertainty and the entire loss, or make the separation himself.

Let us, however, assume that the burden is on the shipper to show the amount of the damage caused by the negligence of the carrier. It is determined by the well-established rules of law applicable to the burden of proof of damages, both in general law and in Admiralty. One of such rules is that where, from the nature of the case, it seems impossible to distinguish between consequences due to the negligence of the wrongdoer and consequences not due to his negligence, the wrongdoer must bear the entire loss rather than the innocent party, or make the separation himself.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251 at 260-262;
Westinghouse Co. v. *Wagner Mfg. Co.*, 225 U. S. 604 at 622;
Jenkins v. *Penn. R. Co.*, 67 N. J. L. 331 at 336;
Story Parchment Co. v. *Paterson Co.*, 282 U. S. 555 at 563-565;
The Mary Belle Roberts, supra (22 Fed. Cas. No. 13240);
The "Atlas", 93 U. S. 302 at 317.

Thus, where there are two causes which contribute to effect a damage, and each cause is produced by a different

source, the innocent person may recover the entire loss from either person responsible for a cause, though the Court will apportion the damage between the wrongdoers.

The "Atlas", supra.

As stated by the Court in *Hamilton Shoe Co.* v. *Wolf Brothers, supra,* by Mr. Justice PITNEY, at page 261:

> "But, as pointed out in the *Westinghouse* case (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, 'on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.'"

and again:

> "Certainly, no formula is suggested by which it could be accomplished."

In the *Westinghouse* case, *supra,* this Court by Mr. Justice LAMAR said at page 622:

> "It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate

> apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion."

In the case at bar, the respondent contended and conceded before the Commissioner that apportionment was a "*practical impossibility*" (R. p. 250). The Commissioner, though he computed that the ventilation was negligently cut off 238 hours and properly cut off 144 hours (R. p. 314), also found that "from the nature of the case it was impossible" to apportion the damage (R. p. 313). The District Court agreed (R. p. 319), and the Circuit Court accepted the facts as found (R. pp. 327-328). "Certainly no formula is suggested by which it could be accomplished" (*Hamilton Shoe Co.* v. *Wolf Bros., supra*, p. 261). If there was a formula, it was the duty of the Circuit Court to send the case back for apportionment (*Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641 at 650, 651) which it refused to do.

In Admiralty, there is a further application of this rule and the most liberal known to our law. There, even where the negligence of the injured party contributed to cause the damage, and proof of the amount caused by the ship is impossible of ascertainment, the loss is divided between the parties.

> *The Max Morris*, 137 U. S. 1;
> *The Eugene F. Moran*, 212 U. S. 466 at 476.

And this is the rule between the ship and the cargo owner, *exceptions in the bill of lading notwithstanding.*

> *Snow* v. *Carruth*, 22 Fed. Cas. No. 13144 (D. C. Mass.), cited with approval in *The Max Morris, supra*, page 14;

American Finance, etc., Co. v. *United States*, 55 F. (2d) 725 (S. D. Cal.).

In *The Max Morris, supra*, this Court by BLATCHFORD, J., said at page 14:

> "In *Snow* v. *Carruth*, 1 Sprague, 324, in the District Court for the District of Massachusetts, damage to goods carried by a vessel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.
>
> "All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper."

CONCLUSION.

Where the nature of the case precludes the apportionment of the damages with certainty, the presumption of law is that the negligence caused the entire damage, and that the injured party has sustained his proof of damages, and whatever uncertainty there is must be borne by the wrongdoer. The entire theory of recovery is compensatory and not punitive—there is no recovery for damage not due to the negligence of the wrongdoer.

We submit that a shipowner whose lack of due diligence in the care of the cargo contributes to cause the damage thereto, cannot apportion or qualify his fault against an innocent cargo owner, and certainly cannot impose on the shipper an added burden of apportioning the result of the ship's negligence.

Just what interpretation must be given to the words "however caused", to effect the expression of law stated by the Circuit Court of Appeals, we need not consider. It is clearly not the most favorable to the shipper, counter to the established rules of law, and it is illegal because it will actually result, in this case (*Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97), to relieve the carrier from "loss or damage arising from negligence" and "lessen, weaken or avoid" its obligation to care for the cargo (*Harter Act*).

As this Court, by Justice SUTHERLAND, said in the case of *Story Parchment Co.* v. *Paterson Co., supra,* at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

The decree of the Circuit Court of Appeals should be reversed.

Dated October 27th, 1934.

Respectfully submitted,

JOSEPH JOFFE,
LOUIS JOFFE,
Counsel for Petitioners.